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83-341

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

PETER PEARSON

Appellant,

vs.

STATE OF OHIO

Appellee,

On Appeal From The Supreme Court of Ohio

JURISDICTIONAL STATEMENT--
STATE CRIMINAL CASE

ALAN J. RAPOPORT, ESQ.
716 Keith Building
Cleveland, Ohio 44115
(216) 696-0600

Attorney for Petitioner

Questions Presented

1. Did the state courts err in denying appellant's motion to suppress evidence when the only probative evidence was hearsay, no reason for the absence of declarant was given and no attempt to establish indicia of reliability of the hearsay was made.

2. Did the state courts err in finding probable cause at a suppression hearing on a charge of carrying a concealed weapon when uncontroverted evidence by the State showed that a weapon was observed in the presence of a defendant from a considerable distance at night, and was therefore not "concealed.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

PETER PEARSON

Appellant,

vs.

STATE OF OHIO

Appellee,

JURSIDICTIONAL STATEMENT--
STATE CRIMINAL CASE

Citation To Opinions Below

The opinion of the Court of Appeals of Ohio, Eighth Appellate District is set forth in the appendix,

infra, at page 32. The opinions of the Supreme Court of Ohio declining to proceed with an appeal of the lower court decision are set forth in the appendix, infra, at pages 28 and 29.

Jurisdiction

In affirming appellant's conviction, the Court of Appeals of Ohio based its decision on Ohio Evidence Rule 104 (A), which that court construed as permitting the use of hearsay at a hearing on a motion to suppress evidence. Appellant's objection to the use of hearsay on constitutional grounds drew into question the validity of that Rule, and the decision of the lower courts therefore held the Rule valid as applied in appellant's case.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 United States Code, Section 1257 (2), review by the Supreme Court of Ohio having been denied thereby leaving intact the decision of the Court of Appeals of Ohio, Eighth Appellate District, as that of the highest applicable state court.

Questions Presented

1. Did the state courts err in denying appellant's motion to suppress evidence when the only probative evidence was hearsay, no reason for the absence of declarant was given and no attempt to establish indicia of reliability of the hearsay was made.

2. Did the state courts err in finding probable cause at a suppression hearing on a charge of carrying a concealed weapon when uncontroverted evidence by the State showed that a weapon was observed in the presence of a defendant from a considerable distance at night, and was therefore not "concealed.

Constitutional Provisions Involved

United States Constitution, Amendments IV, VI, and XIV, as set forth in the appendix, infra, at page 41-42.

Statutory Provisions Involved

This case also involves provisions of Ohio Evidence Rule 104 (A), set forth in an appendix, infra, page 43.

Statement of The Case

Defendant takes this appeal from the decision of the Court of Appeals of Ohio for Cuyahoga County, entered on March 24, 1983, which affirmed a decision of the Court of Common Pleas, denying a Motion To Suppress Evidence filed by defendant.

On the 28th day of January, 1981, defendant was arrested by two members of the Cleveland Police Department in Cleveland, Ohio. (T. 4, 5). The arrest was made by Officers Theodore E. Taylor and Harlin Whorthington. (T. 4). At the time of the arrest, the officers confiscated a handgun and ammunition found on the person of the defendant.

(T. 8, 10). Defendant was subsequently indicted on the sole charge of carrying a concealed weapon.

On August, 25, 1981, the matter came before the Honorable Ann Dyke of the Court of Common Pleas of Cuyahoga County, Ohio in regard to a Motion to Suppress filed by defendant. Evidence presented by the State at that time was entirely limited to testimony of Officer Taylor, one of the two arresting officers, and the gun allegedly seized. No reason for the absence of Officer Whorthington was given by the prosecution. No evidence or testimony was offered by the defense. Defendant's Motion to Suppress was overruled. (T. 28).

Defendant subsequently entered a plea of no contest under the terms of the U. S. Supreme Court decision in NORTH CAROLINA VS. ALFORD, 400 U.S. 25 (1970). (T. 34). No other evidence was presented to the Court, which thereafter found defendant guilty of carrying a concealed weapon. (T. 40-41). An appeal was filed from the ruling of the trial court on defendant's Motion to Suppress, and the Court of Appeals of Ohio for Cuyahoga County affirmed the decision. The Supreme Court of Ohio denied a further appeal for want of a substantial constitutional question.

The Questions Presented Are Substantial

I

Examined closely, the State's evidence against defendant in the hearing on the Motion to Suppress was entirely based on the perceptions of a police officer who did not appear as a witness against him. No probable cause to arrest was demonstrated by Officer Taylor's testimony of what he alone observed. Therefore, denial of the Motion was based on pure hearsay. This violated the constitutional rights of the defendant.

In its opinion, the Court of Appeals of Ohio cited Ohio Evidence Rule 104 (A) as authority for the proposition

that hearsay evidence is admissable in a hearing on a motion to suppress evidence in a criminal case. It cited the case of UNITED STATES VS. MATLOCK, 415 U.S. 164 (1974) in support of that proposition. Although the MATLOCK decision did hold hearsay admissable in a preliminary proceeding such as a suppression hearing, it is clear from a reading of the case that this Honorable Court did not intend to authorize the unlimited use of hearsay under any circumstances at such times.

In MATLOCK, the State was required to prove consent by a third person which was relied upon by police as justification for search of a residence. It sought to introduce the statements of that third person into evidence, over an objection that repetition of the state-

ments by police officers constituted inadmissable hearsay. The MATLOCK Court held that there is no automatic rule against receiving hearsay evidence in suppression hearings. However, this Court made it quite clear in MATLOCK that it saw indications of reliability in the particular case at bar which made that hearsay relatively safe to admit.

Discussion of the background of the case was quite extensive in MATLOCK. The Court cited the fact that no hostility or bias against the defendant on the part of the declarant was evident. Moreover, the Court noted that the declarant had been used as a witness in the proceedings--and was therefore available for cross-examination. The declarant had denied making the statements, so the

Court reasoned that certainly her prior inconsistent statements (albeit hearsay) could have been used to impeach her. Finally, the Court even went so far as to argue that the hearsay was reliable because the declarant had admitted she and the defendant resided together in the residence--and therefore, that the statement was "against penal interest" (and therefore reliable) because cohabitation was illegal in the State of Wisconsin where the event occured. The MATLOCK Court obviously went through contorsions to justify <u>any</u> admission of hearsay in that case.

In the case at bar, the prosecution offered no excuse for the absence of Officer Taylor as a witness. It offered no reason why the hearsay

should be deemed reliable. It merely asserted that hearsay is per se admissable in a suppression hearing under the terms of Ohio Evidence Rule 104 (A). The Court of Appeals applied this Rule in spite of defendant's constitutional challenge based on the Confrontation Clause of the Sixth Amendment.

The Court of Appeals of Ohio later noted that it was "dubious of the method by which the state presented its case at the suppression hearing." It then condemned the state's presentation in much detail.

> It was Officer Whorthington, not Officer Taylor, who allegedly observed the gun in appellant's possession; yet Officer Taylor, not Whorthington, was called to testify. Only Officer Whorthington had probable cause to search appellant, yet his observations were presented

> secondhand. The record does not disclose any explanation why Officer Whorthington did not testify. Officer Taylor was more of an onlooker than a participant in the search and seizure. (Emphasis added)

The Court of Appeals of Ohio then noted that the trial court "could reasonably have concluded that the state failed to meet its burden of proving, by a preponderance of the evidence, that the search was lawful." However, it declined to overrule the lower court as a matter of law. Thus, the Court of Appeals of Ohio allowed prosecutorial conduct which it frankly condemned.

The Court of Appeals of Ohio then neatly avoided the Sixth Amendment argument raised on appeal, i.e. that defendant had been denied an opportunity

to confront the witness whose hearsay statments had condemned him. It did so on the narrow ground that the issue had not been raised in the trial court.

The historical objections to hearsay were recently reinforced by the U. S. Supreme Court in the case of OHIO VS. ROBERTS, 448 U.S. 56 (1980). It looked specifically at the Sixth Amendment's Confrontation Clause, made applicable to the States through the Fourteenth Amendment, POINTER VS. TEXAS, 380 U.S. 400, 403-405 (1965); DAVIS VS. ALASKA, 415 U.S. 308, 315 (1974), which provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." The ROBERTS Court refused to read the Clause literally to exclude any

statement made by a declarant not present at trial, but felt there was little doubt that the Clause was "intended to exclude some hearsay." 448 U.S. at 63. It quoted earlier decisions of the Court to establish that the Clause envisions

> "a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." Mattox v. United States, 156 U.S. at 242-243.

It then noted that these means of testing accuracy are so important that the absence of proper confrontation at trial "calls into question the ultimate integrity of the fact-finding process." 448 U.S. at 64. Realizing that competing

interests are involved, the Court tried to establish a rule for the use of hearsay at trial.

> ... when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissable only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness. 448 U.S.at 66.

The issue for this Honorable Court is whether the test in ROBERTS should be applied, even though the case at bar involves a preliminary proceeding, given the qualified nature of the opinion of the Court in UNITED STATES VS. MATLOCK, supra, relied upon by the Court of

Appeals of Ohio below.

The Sixth Amendement Confrontation Clause creates a fundamental right on the part of an accused. For the Court of Appeals of Ohio to refuse even to discuss the question is hard to understand. After all, this right has been held to be non-waiverable by the silence of a defendant even when he has pled guilty to a crime. BOYKIN VS. ALABAMA, 395 U.S. 238 (1969). In the case at bar, defendant pled no contest under NORTH CAROLINA VS. ALFORD, 400 U.S. 25 (1970), thereby attempting to preserve all issues on appeal. He did not waive objections. There can be no doubt that the hearsay evidence was admitted below over proper and timely objection. There can also be no doubt that introduction of that

evidence did raise a Sixth Amendment question. A reviewing court can, and must, look to the fundamental constitutional rights involved and the possibility of plain error below.

The case at bar involves a preliminary proceeding of sorts. However, this "preliminary" proceeding has a very substantial practical effect on a defendant. If evidence is admitted, over objection or otherwise, the defendant may be forced to bargain away his freedom. This Court sanctioned such bargaining in NORTH CAROLINA VS. ALFORD, 400 U.S. 25 (1970), in which it said that a defendant could agree to a plea of no contest and a finding of guilty to avoid the mere risk that he would be found guilty at trial and incur greater penalty. Thus, if it

allows prosecutors the lattitude to avoid confrontation of key witnesses at preliminary hearings on a motion to suppress evidence, this Court will be signalling the death knell of the adversary process in such hearings.

Allowing the prosecution to prove its case on such an issue without providing its best witness for cross-examination was a gross deprivation of due process by both the trial court and the Court of Appeals of Ohio. The Court of Appeals of Ohio properly condemned the State's procedure--and then, strangely enough, allowed it. Defendant-appellant therefore asks this Court to review the matters stated herein in greater detail by granting an appeal in this case.

II

Even if the hearsay testimony of Officer Taylor was properly admitted into evidence at the suppression hearing below, the decision of the trial court to deny the Motion To Suppress cannot be justified in terms of the overwhelming evidence provided by the State that the police saw a weapon from a considerable distance at night. The sole issue raised was "concealment." Therefore, the decision that the State had met its burden of proof was manifestly against the weight of the evidence.

Defendant was one of three males standing next to each other. (T. 17). Officer Whorthington allegedly saw a weapon through the dark of night from

his seat in a moving vehicle perhaps 25 yards away. Officer Taylor saw nothing suspicious beyond a pulling by defendant on his own coat. The overwhelming inference to be drawn is that the weapon was not concealed from Officer Whorthington, much less from the persons standing directly next to the defendant.

The test for "concealment" urged upon the courts below was set by the Highland County Court of Appeals of Ohio in STATE VS. PETTIT, 20 Ohio App.2d 170 (Highland Co., 1969), which cited SHIPLEY VS. STATE, 243 Md. 262 (1966):

> We think that a recognized test is that a weapon is concealed if it is so situated as not to be discernible by ordinary observation by those near enough to see it if it were not concealed who could come into contact with the possession in the usual associations of life;

This test does not require absolute invisibility be proved by the State, but neither does it require a defendant prove absolute visibility to persons not making an ordinary observation. The case at bar is worthy of this Honorable Court's review for the purpose of adopting this test, if for no other reason.

The Court of Appeals of Ohio below completely failed to deal with the issue presented to it. It held that since Officer Taylor had retrieved a weapon from underneath defendant's clothing, concealment had been demonstrated. It therefore completely ignored its own earlier observation in the written opinion, in which it stated that:

> It was Officer Whorthington, not Officer Taylor, who allegedly observed the gun in appellant's possession; yet

> Officer Taylor, not Whorthington, was called to testify. Only Officer Whorthington had probable cause to search appellant, yet his observations were presented secondhand. (Emphasis added)

The Court of Appeals of Ohio erred in deciding the issue based on Officer Taylor's testimony. If there was any justification for the search, it was due to what Officer Whorthington saw. Appellant contended that even if hearsay was admissable, the evidence could not have supported a finding that Officer Whorthington had probable cause to stop and search the defendant.

Officer Taylor could not have had probable cause. The courts below never even addressed the question of probable cause raised by the second Assignment of Error. They were satisfied

that that weapon was concealed from Officer Taylor. Under the Fourth Amendment, there could be no valid search or seizure of defendant's person unless there was probable cause to believe a crime--here, "concealment" of a weapon--had occured. Uncontradicted testimony of the absent Officer Whorthington established that there was no concealment. Therefore, there was no probable cause.

Thus, the Court of Appeals of Ohio below completely ignored defendant's second Assignment of Error. This Court has held that when a judicial decision is totally devoid of evidentiary support, it cannot be allowed to stand under the Due Process Clause of the Fourteenth Amendment. THOMPSON VS. CITY OF LOUISVILLE, 362 U.S. 199 (1960). Defendant now asks

this Honorable Court to review the record, determine the law of the case which is applicable, and find that the State did not meet its burden to prove the validity of the search in this case by a preponderance of the evidence as required by law.

III

The case at bar presented to this Court has two questions of great import which should be decided. First, there is the question of the use of hearsay in suppression hearings. Unless this Court wishes to allow unlimited use of hearsay at such times, it must set forth proper guidelines to aid the judiciary in protecting fundamental rights under the Sixth and Fourteenth

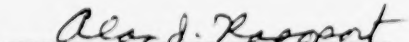
Amendments. The issue is clearly focused in this case, and it would benefit the Court to have the matter completely briefed and argued by counsel.

Second, there is the question of the complete failure of the Court of Appeals of Ohio to deal with an assignment of error based on the manifest weight of the evidence. When, as in the case at bar, the oversight of an argument is so complete as to deprive a defendant of due process of law, this Court should grant an appeal so that the argument is confronted directly and forcefully by a panel of judges.

Conclusion

The questions presented by this appeal are substantial and require plenary consideration by the court for their resolution.

Respectfully submitted,



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Attorney for Appellant

APPENDIX

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 83 TERM

To wit: June 29, 1983

State of Ohio,
Appellee,
vs.
Peter Pearson,
Appellant.

No. 83-786

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS

for CUYAHOGA *County*

It is ordered by the Court that this motion is overruled.

FOR YOUR INFORMATION ONLY
NOT FOR [illegible]

COSTS:

Motion Fee, $20.00, paid by Alan J. Rapoport

I, James Wm. Kelly, *Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.*

Witness my hand and the seal of the Court this ..... *day of* ..... *19* .....

..... *Clerk*

..... *Deputy*

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,
City of Columbus.

19..83 TERM

To wit: June 29, 1983

State of Ohio,
Appellee,
vs.
Peter Pearson,
Appellant.

No. 83-786

APPEAL FROM THE COURT OF APPEALS

for CUYAHOGA *County*

This cause, here on appeal as of right from the Court of Appeals for CUYAHOGA *County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.*

FOR YOUR INFORMATION ONLY NOT FOR FILING

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for CUYAHOGA *County for entry.*

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of ..... 19.....

..... Clerk

..... Deputy

IN THE SUPREME COURT OF OHIO
Case No. 83-786
Court of Appeals Case No. 44552
Common Pleas Case No. CR-161966

STATE OF OHIO	)	
Appellee	)	NOTICE OF APPEAL
	)	
-vs.-	)	
	)	
PETER PEARSON	)	
Appellant	)	

Notice is hereby given that PETER PEARSON, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order overruling his motion for leave to appeal from the Court of Appeals for Cuyahoga County, and the final order dismissing said appeal, entered June 29, 1983. This

appeal is taken pursuant to 28 U.S.C. Section 1257 (2).

Alan J. Rapoport, Esq.
716 Keith Building
Cleveland, Ohio 44115
(216) 696-0600
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing Notice of Appeal were delivered to the office of the County Prosecutor of Cuyahoga County, Ohio, filed with the Clerk of the Court of Appeals of Cuyahoga County, and filed with the Clerk of the Court of Common Pleas of Cuyahoga County, Ohio on the 28th day of July, 1983.

Alan J. Rapoport
Attorney for Appellant

(Original Filed August 1, 1983)

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

NO. 44552

State of Ohio	APPEAL FROM
APPELLEE	COMMON PLEAS COURT
-vs.-	No. CR-161966
Peter Pearson	JOURNAL ENTRY AND
APPELLANT	OPINION

DATE: MAR 24, 1983

JACKSON, J.:

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon

review the following disposition was made:

Appellant was indicted for carrying a concealed weapon. He filed a motion to suppress the evidence seized by the police following a search of his person. The trial court overruled this motion. Appellant thereupon pled no contest, was convicted of the charge contained in the indictment, and sentenced to a term of one to ten years at the Ohio State Reformatory.*

On appeal from his conviction and sentence appellant assigns two errors for review.

I.

Assignment of Error No. 1:

> THE COURT ERRED IN REFUSING TO SUPPRESS EVIDENCE WHEN THE ONLY EVIDENCE OF CAUSE TO SEIZE AND SEARCH THE DEFENDANT WAS BASED ON HEARSAY.

---

*/ Three months later the trial court released appellant on "shock probation" pursuant to R.C. 2947.061.

Cleveland Police Officer Theodore Taylor stated that at about 9:30 p.m. on the evening of January 28, 1981, he and his partner, Harlin Whorthington, heard three shots as they were leaving an assignment at East 134th Street and South Woodland. (Tr. 4-5). They drove west on South Woodland to look for the source of the shots. (Tr. 5). As they approached an intersection where three men were standing, Taylor testified, over the objection of defense counsel, that Whorthington hollered, "Stop", and said that one of the men had a gun. (Tr. 5-7). Whorthington told the men to "freeze", and patted down the appellant while Taylor held his gun on the three men. (Tr. 8). Whorthington removed a loaded nine caliber automatic revolver and several rounds of ammunition from

underneath the appellant's jacket. (Tr. 8-10).

Officer Whorthington did not testify.

Evidence Rule 104 (A) provides:

> "Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (B). In making its determination it is not bound by the rules of evidence except those with respect to privileges."

Ohio Evidence Rule 104 (A) is identical to Federal Evidence Rule 104 (A). The federal rule has uniformly been interpreted as permitting the trial court to consider hearsay evidence at a hearing on a motion to suppress in a criminal case. United States v. Matlock (1974), 415 U.S. 164; See Annot., Admissibility of Hearsay Evidence for Court's Determin-

ation, under Rule 104 (A) of the Federal Rules of Evidence, of Preliminary Questions of Fact, 39 A.L.R. Fed. 720. This Court is constrained to rule in accord with these cases, and holds that the trial court in the case at bar did not err in allowing Officer Taylor to relate what Officer Whorthington said.

This Court of Appeals, however, is dubious of the method by which the state presented its case at the suppression hearing. It was Officer Whorthington, not Officer Taylor, who allegedly observed the gun in appellant's possession; yet Officer Taylor, not Whorthington, was called to testify. Only Officer Whorthington had probable cause to search appellant, yet his observations were presented secondhard. The record does not disclose any explana-

tion why Officer Whorthington did not testify. Officer Taylor was more of an onlooker than a participant in the search and seizure. The trial court could reasonably have concluded that the state failed to meet its burden of proving, by a preponderance of the evidence, that the search was lawful. However, this Court of Appeals declines to hold, as a matter of law, that the state failed to meet its burden of proof.

Furthermore, appellant was denied the opportunity to cross-examine Officer Whorthington. However, since appellant did not raise in the trial court, the question of whether he was denied his Sixth Amendment right to confront the witness against him this Court cannot determine this constitutional issue.

The first assignment of error is not well taken.

II.

Assignment of Error No. 2:

> THE COURT ERRED IN REFUSING TO SUPPRESS EVIDENCE, EVEN IF THE HEARSAY STATEMENTS WERE ADMISSIBLE, WHEN THOSE STATEMENTS ESTABLISHED DEFENDANT'S GUN WAS VISIBLE AND, THEREFORE, NOT CONCEALED.

In his second assignment of error, appellant contends that there was insufficient evidence to show that his weapon was concealed when Officer Whorthington searched him, and that therefore the police lacked probable cause to believe he was committing a crime. According to the testimony of Officer Taylor, the gun was retrieved from underneath appellant's clothing. Thus, concealment of the weapon is demon-

strated. The second assignment of error is not well taken.

Accordingly, the decision of the trial court is affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

LEO A. JACKSON
JUDGE

MARCUS, P.J., CONCURS IN JUDGMENT ONLY

NAHRA, J., CONCURS IN JUDGMENT ONLY

For plaintiff-appellee: John T. Corrigan

For defendant-appellant: Alan J. Rapoport

STATE OF OHIO, CUYAHOGA COUNTY } ss

IN THE COURT OF COMMON PLEAS

SEPTEMBER TERM 19 81

STATE OF OHIO — PLAINTIFF

vs.

PETER D. PEARSON — DEFENDANT

TO WIT: October 27, 19 81

NO. CR 181966

INDICTMENT

CARRYING CONCEALED WEAPON (01)

RECEIVED FOR FILING

NOV 2 1981

JOURNAL ENTRY

The defendant herein having, on a former day of court, plead guilty to Carrying Concealed Weapon, RC 2923.12 as charged in the indictment

was this day brought into court with his counsel present.

Thereupon the court inquired of the said defendant if he had anything to say why judgment should not be pronounced against him; and having nothing but what he has already said and showing no good and sufficient cause why judgment should not be pronounced:

It is therefore ordered and adjudged by the court that defendant Peter D. Pearson be imprisoned and confined in the Ohio State Reformatory, Mansfield, Ohio for a term of one (1) year to ten (10) years.

~~Each and every count of the indictment contained in said proceedings is hereby~~ and that he pay the cost of this prosecution for which execution is awarded.

The defendant is remanded to Jail.

Inn Dyke, Judge
rp-10-28-81
rr-10-28-81
C of C in C

JUDGE

VOL 458 PG 119

UNITED STATES CONSTITUTION

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ...

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OHIO RULES OF EVIDENCE

Rule 104. Preliminary Questions

(A) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (B). In making its determinations it is not bound by the rules of evidence except those with respect to privileges.

CERTIFICATE OF SERVICE

I, ALAN J. RAPOPORT, certify that I am a member of the bar of this Court and that I am counsel for appellant Peter Pearson in the above styled and that I have this day served copies of the foregoing Jurisdictional Statement upon:

John T. Corrigan, Esq.
County Prosecutor
8th Floor
Courts Tower
1200 Ontario Street
Cleveland, Ohio 44113
(216) 623-7800
Attorney for Appellee

This 25th day of August, 1983.

Alan J. Rapoport
Alan J. Rapoport
Of Counsel

Supreme Court, U.S.
FILED
JUL 22 1983

No. 83-341

In the Supreme Court of the United States

October Term, 1983

PETER PEARSON,
Appellant,
vs.
STATE OF OHIO,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. WHETHER THE TRIAL COURT MAY CONSIDER HEARSAY, AS WELL AS DIRECT EVIDENCE AT A HEARING ON A MOTION TO SUPPRESS EVIDENCE IN A CRIMINAL CASE.

2. WHETHER THIS COURT SHOULD CONSIDER APPELLANT'S ARGUMENT ALLEGING DENIAL OF CONFRONTATION UNDER THE SIXTH AMENDMENT WHEN APPELLANT NEVER RAISED THE ISSUE AT THE MOTION TO SUPPRESS AND NEVER SUBPOENAED THE LAW ENFORCEMENT OFFICER AS HIS WITNESS.

3. WHETHER THIS COURT WILL REVIEW THE SUFFICIENCY OF THE EVIDENCE TO SUPPORT A FINDING OF GUILTY ON A NO CONTEST PLEA TO CARRYING A CONCEALED WEAPON WHERE THE UNCONTESTED EVIDENCE DEMONSTRATES THAT THE WEAPON WAS RETRIEVED FROM UNDERNEATH APPELLANT'S CLOTHING.

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No. 83-341

In the Supreme Court of the United States

October Term, 1983

PETER PEARSON,
Appellant,

vs.

STATE OF OHIO,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Ohio on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

OBJECTIONS TO JURISDICTION

There are no substantial federal questions involved which would require this Court to review this case. Furthermore, the federal questions sought to be reviewed were not timely or properly raised.

The questions herein presented were raised in the Court of Appeals of Cuyahoga County, Ohio, and the Supreme Court of Ohio.

The Court of Appeals, Eighth Judicial District, affirmed the conviction. The Supreme Court of Ohio refused leave to appeal and dismissed an appeal as of right for the reason that no substantial constitutional question exists in this case.

The Ohio courts decided this case in accordance with the statutes of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court.

No substantial federal question is presented by this appeal.

HISTORY OF THE CASE

Appellant was indicted for carrying a concealed weapon. Appellant's counsel filed a motion to suppress the weapon seized by the police following a search of his person. The trial court overruled the motion to suppress.

Thereafter, Appellant pled no contest, and was found guilty by the trial court. Three months after the plea of no contest, the trial court released Appellant on "shock probation" pursuant to Ohio Revised Code, Section 2947.061.

Appellant's appeal to the Ohio Court of Appeals, Eighth Judicial District, resulted in his conviction being affirmed.

The Ohio Supreme Court declined jurisdiction finding no substantial constitutional question presented for review.

STATEMENT OF THE CASE

At the suppression hearing, Cleveland Police Officer, Theodore Taylor, stated that at about 9:30 p.m. on the evening of January 28, 1981, he and his partner, Harlin Whorthington, heard three shots as they were leaving an assignment at East 134th Street and South Woodland (R. 4-5). They drove west on South Woodland to look for the source of the shots (R. 5). As they approached an intersection where three men were standing, Taylor testified that the appellant was pulling on his coat. Taylor also testified, over the objection of defense counsel, that his partner, Whorthington, hollered, "Stop," and said that one of the men had a gun (R. 507). Whorthington told the men to "freeze," and patted down the appellant while Taylor held his gun on the three men (R. 8). Whorthington removed a loaded nine caliber automatic revolver and 62 live rounds of ammunition from underneath the appellant's jacket (R. 8-10).

Officer Taylor personally observed his partner remove the weapon and ammunition from Appellant (R. 8-10).

Subsequently, Appellant pled no contest and was found guilty of carrying a concealed weapon.

MOTION TO DISMISS OR AFFIRM

1. **THE TRIAL COURT CAN CONSIDER HEARSAY, AS WELL AS, DIRECT EVIDENCE AT A SUPPRESSION HEARING.**

2. **FAILURE OF APPELLANT TO RAISE AN ISSUE RELATING TO A DENIAL OF CONFRONTATION CONSTITUTES A WAIVER, AND THUS, CANNOT BE RAISED IN LATER APPELLATE PROCEEDINGS.**

Appellant argues that hearsay evidence may not be considered at a suppression hearing. That issue has been decided by this Court in *United States v. Matlock,* 415 U.S. 164 (1974). Appellant fails to recognize that hearsay evidence was not the only evidence presented at the suppression hearing. Direct evidence was offered by the prosecution when Officer Taylor personally observed his partner remove a weapon and ammunition from the appellant (R. 8-10). Thus, the trial court had ample evidence upon which to overrule the appellant's motion to suppress.

Appellant also argues that he was denied the opportunity to cross-examine Officer Whorthington who was not present at the suppression hearing. Appellant waived this so-called argument of confrontation when appellant did not raise this issue in the trial court. See, *State v. Williams,* 51 Ohio St. 2d 112 (1977); and *Toledo v. Reasonover,* 5 Ohio St. 2d 22 (1965). See also, *Wainwright v. Sykes,* 433 U.S. 72 (1977).

Moreover, the appellant at the suppression hearing, never subpoenaed Officer Whorthington as a witness despite possessing the right to do so.

3. THIS COURT WILL NOT REVIEW THE SUFFICIENCY OF THE EVIDENCE PRESENTED IN THIS CASE.

At a suppression hearing the prosecution has no greater burden of proof than proof by a preponderance of the evidence. *United States v. Matlock, supra.*

According to the testimony of Officer Taylor, the weapon and ammunition were retrieved from underneath the appellant's clothing. Thus concealment was amply demonstrated.

In the present case, the search and subsequent arrest of the appellant were lawful. Patrolman Taylor was using good police work in this case. He had a reasonable suspicion that someone had a gun in the area. He had heard three gunshots and since he was in his police cruiser, responded to the area within moments. Ptl. Taylor also stated that of the only three males he saw in the area, the appellant, Peter Pearson, was making an unusual movement by pulling on his jacket. Even without the statement of Ptl. Worthington that he thought one of the males had a gun partially visible, Ptl. Taylor had enough "articulable facts" which would lead to "rational inference" that he should investigate the defendant. Thus, there were adequate grounds to search the appellant. Prior to the search, Officer Taylor had not seen any gun on the appellant. It was the lawful search of the appellant which revealed the weapon, and gave rise to the grounds for the arrest for carrying a concealed weapon. The testimony was *uncontroverted* that the gun was *underneath* the coat of the appellant, Peter Pearson, at the time of the search. No evidence was presented to show that the gun was found anywhere else. At the time of the stop and frisk, the gun was concealed *underneath* the coat of Peter Pearson.

The question of concealment is a question of fact, a jury question. The appellant pled no contest and was found guilty.

Under Ohio Rules of Criminal Procedure 11(b)(2), "The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment. . ."

CONCLUSION

Wherefore, Appellee respectfully submits that the questions upon which this cause depends are so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal or in the alternative, to affirm the judgment entered in the cause by the Ohio Supreme Court.

Respectfully submitted,

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